IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1964

NO. 382

FRANK J. PATE, Warden,

Petitioner,

vs.

UNITED STATES ex rel. THEODORE ROBINSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Frank J. Pate, Warden, Illinois State Penitentiary, by William G. Clark, Attorney General of the State of Illinois, his attorney, prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on May 3, 1965.

CITATION TO OPINION BELOW.

The opinion of the Circuit Court of Appeals, printed in the Appendix hereto, is reported at 345 F. 2d 691.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on May 3, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED.

1) Whether the issue of a defendant's sanity at the time of the crime raises a federal constitutional question cognizable on federal *habeas corpus*?

2) Whether the question of a defendant's sanity at the time of his trial raises such a question?

3) Assuming the question of his sanity at the time of the trial is cognizable in a federal *habeas corpus* proceeding:

a) Whether that issue can be waived if the defendant does not raise it at trial?

b) Whether the state hearing on that issue was full and fair in this case?

THE FACTS.

The respondent was indicted for murder by the Grand Jury in March, 1959. On arraignment counsel was appointed and the State's Attorney informed the court the respondent had previously been committed to a mental institution. Thereupon a behavior clinic examination was ordered. Subsequently a plea of not guilty was entered, the respondent waived trial by jury and a bench trial was commenced. (App. 5)

The State's evidence conclusively showed that on February 28, 1957, Flossie May Ward was shot and killed by the Respondent in a Chicago restaurant where she was employed. (App. 7-13)

The evening of the same day, Clarence Starr, a Chicago Police Officer, received information from one Robert Moore that the Respondent, who had been identified as the killer, was in Moore's apartment on the thirteenth floor of a Chicago apartment building. As three officers stepped out of the elevator respondent was half way between the apartment and the elevator. The officers did not recognize him and they proceeded to the apartment where Mrs. Moore informed them that the respondent had just left. The officers then noticed respondent who was still standing in the hall. Upon inquiry he identified himself as Robinson and was arrested and charged with murder. (App. 11-13)

The respondent at trial did not contest the fact that he fired the fatal shot but rather attempted to prove that he was insane at the time of the crime. His mother testified that when he was seven or eight he was hit on the head by a brick and that thereafter he had acted peculiarly and suffered from headaches. (App. 16-17)

His mother testified that when he was on leave from the service and staying with her, he flew into a rage for no apparent reason and kicked a hole in a bar in her living room. (App. 16)

Respondent's mother testified further that from the time he returned from the service he had a glare in his eyes and seemed to be lost in himself and when she attempted to speak to him he glared and said nothing was wrong with him. (App. 17)

Helen Calhoun, an aunt of respondent, testified to an incident which occurred in 1951 in her apartment when respondent paced the floor and said someone was after him. He refused to allow his mother to come into the room when she arrived at the aunt's apartment in response to the aunt's call. When his mother did gain admittance and tried to

hug respondent, he pushed her away telling her someone was going to shoot him. He was foaming at the mouth at that time (App. 18). On this occasion police were called and when they finally gained entrance against respondent's resistance, after one look at him, they said he would have to go to the hospital since he had lost his mind. (App. 19)

From Hines Hospital he was transferred by ambulance to County Hospital. During the trip from Hines to County Hospital it was necessary to hold him to prevent him jumping out. After a week in County Hospital, he was sent, by court order, to Kankakee State Hospital where he stayed until he was signed out by his wife six or seven weeks later. (App. 19)

In 1953, respondent attempted suicide, shooting himself in the head after he had killed his 18-month old baby. (App. 20) A prison term of approximately four years followed the killing of his baby.

Following release of respondent from the penitentiary, respondent's mother in the summer of '57 or '58, went to the 48th street police station and took out a warrant for him, telling the police she believed him to be insane and wanted to have him picked up so she could have him returned to a mental institution (App. 20). This warrant was never served and thereafter, shortly prior to February of 1959, his mother had a second warrant issued. (App. 21) His mother testified that he did not appear to be normal throughout this time; he looked "starey-eyed", paced the floor and usually refused to talk, that he looked extremely sad, glared at her and refused to speak to her. (App. 21) His mother's opinion, based on these observations, was that her son was insane, incapable of distinguishing right and wrong and he "thinks whatever he does is right." (App. 22)

It was brought out in the examination that respondent was a heavy drinker and acted strangely sometimes when he had been drinking, but that he also acted strangely when he had not been drinking. (App. 22)

Alice Moore, no relation, testified she had known respondent since he was ten years old. She corroborated the mother's testimony of the incident when he destroyed the bar in his mother's living room. It was her opinion when he is in his glaring, untalkative moods he is insane and does not know the difference between right and wrong. (App. 23) Mrs. Moore testified that the "bar" was one in which glasses were kept and to her knowledge there had never been any intoxicating beverages in the bar. (App. 23)

Respondent's grandfather, William Langham, testified he first noticed a change in his grandson following his return from the Army; that he had employed him to help paint ceilings and that respondent would suddenly stop working, come down the ladder and walk out without saying anything, apparently in a daze, and after being gone two or three hours, would return apparently all right. (App. 23) He also testified regarding an occasion when respondent and his wife were fighting and he attempted to kick in a door, gathered up his wife's clothing and was going to burn them. Police were called on this occasion.

The grandfather testified that as recently as three or four days prior to the time of the shooting of Flossie Mae Ward, the respondent seemed giddy. (App. 24) It was his opinion that since returning from the Army, respondent did not have a good mind, that he was insane and did not know the difference between right and wrong. (App. 24)

The respondent's aunt, recalled as a witness, testified she had known him since he was a baby (App. 26), and further corroborated the testimony of his mother as to the

incident at her apartment just prior to his commitment to the Kankakee State Hospital. When he first came to her home he told her someone was trying to kill him, and paced the floor "starey-eyed". She was washing windows when he arrived and he told her to get down from the window because they were trying to kill her too. Respondent on arrival at Hines Hospital with his aunt and his mother was starey-eyed, prancing about deliriously and was strapped to a wheelchair. (App. 26)

In recounting the occasion when respondent had killed his 18-month old son, Mrs. Calhoun testified that he brought the baby to her home as he had no place to go, that she went to work and upon her return saw the baby lying on the floor. She called the fire department ambulance and on arrival at the hospital it was determined the baby had been shot. At this time the aunt said respondent had a wild look in his eyes, was nervous, prancing, staring wildly, and that it was impossible to understand him when he talked. (App. 28-29) Respondent stayed with the aunt for a period of time thereafter, during which time he was extremely nervous and she was afraid of him, but the record is not clear as to whether it was '57-'58 or '58-'59. (App. 30)

A stipulation was made on respondent's behalf that a police officer, Theodore Davis, if called as a witness would testify that respondent, after the shooting of his 18-month old baby, in March of 1953, had gone to the South Park Police station and told Davis he wanted to confess a crime; that the respondent had a bullet wound in his head, and had attempted to commit suicide by jumping into a lagoon. (App. 25)

Although analysis of the medical records of the Kankakee State Hospital, which were introduced into evidence by stipulation (Defendant Exhibit No. 3), disclosed that when respondent was admitted to the hospital he was hearing

voices, seeing things, imagined someone was outside with a pistol aimed at him, and that he had been drinking heavily and might possibly be schizophrenic, the examiner concluded he had recovered and saw no objection to "giving him a try", inasmuch as his wife was requesting it. (App. 32-33)

Attempts by counsel for respondent to obtain other witnesses on his behalf were unavailing, as was the respondent's request, at the beginning of the trial, that various witnesses he supoenaed along with everyone known to have been in the restaurant at the time of the shooting. (App. 14) Questioning of police officers and the assistant state's attorney revealed that most of the occurrence witnesses were not available.

When respondent asked that Mr. and Mrs. Robert Moore be subpoenaed, he could not tell what they would testify to and the court stated it could not subpoena people unless he told what they would testify to. (App. 15-16) Later the same day, after three of respondent's live witnesses had testified, respondent's counsel stated that there was a doctor from the Psychiatric Institute that he had been trying to contact, whom he felt could be reached by morning. The Court stated:

> "If you subpoenaed him, I will issue an attachment. If you did not subpoena him, we cannot delay the trial. You must prepare your lawsuit before you go to trial. You are on trial now for two days. Other cases are waiting. We have to proceed. If you subpoenaed him, prepare a petition and I will send for him. If you did not subpoena him, it is unfortunate." (App. 25)

At the conclusion of respondent's evidence, it was stipulated that if Dr. Haines, the Director of the Behavior Clinic of the Criminal Court of Cook County were called as a witness, he would testify that he had examined the respondent approximately two months earlier and that the respondent at that time knew the nature of the charges against him

and was able to cooperate with counsel. A further stipulation. that he would testify that the respondent is sane. was rejected. (App. 30)

Final argument was waived by the State, and at the conclusion of the arguments for respondent, respondent again attempted to raise the issue of his desire to subpoena various witnesses, including the Moores. However, the Court pronounced his verdict of guilty. He was sentenced to life imprisonment, and he appealed, as an indigent, to the Supreme Court of Illinois where his conviction was affirmed. (22 Ill. 2d 162 [1961]) A petition for writ of *certiorari* to the United States Supreme Court was denied (368 U. S. 857) (R. 13)

In April 1962 a petition for writ of *habeas corpus* filed in the District Court was originally dismissed on April 18, 1962 for failure to exhaust State remedies. Subsequently that order was vacated and the petition reinstated, on the basis that later decisions of the United States Supreme Court showed that petitioner had exhausted his State remedies within the meaning of 28 U. S. C. § 2254. (App. 3)

The petition for writ of *habeas corpus* filed in the District Court indicated that petitioner's constitutional rights were violated in the 1959 State court proceedings, and further asserted petitioner was indigent and requested counsel be appointed to aid him. (App. 1-2) Leave was granted April 13, 1962 by the District Court to file his petition for writ of *habeas corpus* in *forma pauperis*, but counsel was not appointed. (App. 3) Motions in the District Court and this Court for certificate of probable cause and for leave to appeal were denied.

On respondent's motion, in 1963, to reinstate his petition for writ of *habeas corpus*, an order was entered by the District Court May 1, 1963, requiring respondent to furnish a

transcript of the record in the Criminal Court of Cook County. (App. 3)

The District Court, on May 27, 1963, vacated its prior order dismissing the petition for writ of *habeas corpus* for failure to exhaust State remedies, reinstated the petition and denied it without hearing, citing 22 Ill. 2d 162 (1961) as authority therefor, and on June 12, 1963 a certificate of probable cause and leave to appeal in *forma pauperis* was granted. (App. 4)

The United States Court of Appeals (Seventh Circuit) in a decision issued May 3, 1965, reversed and remanded for a hearing on the issue of Robinson's insanity at the time of the crime and his insanity at the time of the trial. A stay of the mandate of that court has been granted to permit presentation of a petition for *certiarori* by the People of the State of Illinois to the United States Supreme Court.

REASONS FOR GRANTING THE WRIT.

The Circuit Court of Appeals for the Seventh Circuit remanded this case to the District Court for a determination of two questions: (1) whether Robinson was insane at the time he committed the crime in question and (2) whether he was insane at the time of his trial. It is contended that on the facts of this case the decision of the state court on these issues is conclusive.

The question of a person's sanity at the time the alleged crime is committed is beyond the scope of a federal *habeas corpus* proceeding.

It is believed that the present decision is the first in which a federal appellate court has indicated that such a determination can be subject to collateral attack.

All other circuit courts which have considered the question have ruled that the question of a person's competency

at the time of the commission of a crime cannot be the basis for a writ of *habeas corpus*. *Taylor* v. *United States*, 282 F. 2d 16 (8th Cir. 1960); *Bishop* v. *United States*, 223 F. 2d 582 (D. C. Cir. 1955) rev'd on other grounds, 350 U. S. 961.

Other circuits have ruled that neither insanity at the time of the crime nor insanity at the time of the trial can form the basis for a collateral attack upon a conviction. *Hahn* v. *United States*, 178 F. 2d 11 (10th Cir., 1949); *Whelchel* v. *McDonald*, 176 F. 2d 260 (5th Cir. 1949); *Hall* v. *Johnson*, 86 F. 2d 820 (9th Cir. 1936).

Thus the present decision remanding the case for a determination of Robinson's insanity at the time of the crime is in conflict with the law established in at least five different circuits. It is also inconsistent with the decision of this Court in *Leland* v. *Oregon*, 343 U. S. 790.

In the *Leland* case this Court ruled that it was not a violation of due process of law for a state to adhere to the McNaughton test for insanity nor to require that the defendant prove his insanity beyond a reasonable doubt. If the issue of insanity at the time of the crime is to be reviewed in a collateral attack upon the conviction as a matter of federal constitutional law, the same test must be applicable to every defendant. It would no longer be a subject upon which the various states and federal circuits could adopt differing tests. Therefore, the decision in the *Leland* case which permits diversity in the tests applied and the burden of proof on this subject is inconsistent with the order requiring the District Court to review the question of Robinson's insanity at the time of the crime.

In its decision the Circuit Court of Appeals stated that *Smith* v. *Baldi*, 344 U. S. 561, establishes that "The conviction by a state court of a person for an alleged crime committed while insane violates due process of law under the Fourteenth Amendment." It is contended that *Smith* v.

Baldi does not stand for that proposition. The issue in this regard in that case was stated by this Court as follows:

> "The next contention of petitioner is that he was denied due process. In substance this issue presents questions as to (1) whether the state should have allowed him to plead guilty without having first formally adjudicated the question of his mental competency, and (2) whether it should have permitted him to plead at all to a capital offense without affording him the technical services of a psychiatrist." (344 U. S. 561)

The only question raised was that of the fairness of the state procedure. This Court did not hold or indicate that if there were any question of the insanity of Smith at the time of the crime he should have been granted a *habeas corpus* hearing on this question. It is clear that this case in no way contradicts the prior authority which establishes that the question of the sanity of an individual at the time of the crime cannot be raised in a collateral attack upon his conviction.

It is, therefore, contended that the decision of the Circuit Court of Appeals requiring a full hearing on this question should be reviewed and reversed by this Court.

The question of Robinson's sanity at the time of the trial raises issues which are not clearly established. Prior to the decision of this Court in *Bishop* v. *United States,* 350 U. S. 961, there was a conflict between the circuits on whether insanity at the time of the crime could be raised as a collateral attack on a conviction. Compare *Hahn* v. *United States,* 178 F. 2d 11, (10 Cir. 1949); *Whelchel* v. *United States,* 176 F. 2d 260 (5th Cir. 1949); *Hall* v. *Johnson,* 86 F. 2d 820 (9th Cir. 1936), with *Sanders* v. *Allen,* 100 F. 2d 717 (D. C. Cir. 1938).

The *Bishop* case arose in the District of Columbia Circuit where the issue could be raised. The Court of Appeals

held that although the question could be entertained, they affirmed the decision of the trial court that Bishop was sane at the time of the trial. (223 F. 2d 582) This Court in a *per curiam* decision vacated the judgment and remanded the case "to the District Court for a hearing on the sanity of the petitioner at the time of his trial." (350 U. S. 961)

While some circuits have interpreted *Bishop* as establishing that the question of insanity is cognizable in a *habeas corpus* proceeding, the Tenth Circuit has consistently held to the contrary. *Nunley* v. *United States,* 283 F. 2d 561 (1960); *Hereden* v. *United States,* 286 F. 2d 526 (1961); *Clay* v. *United States,* 303 F. 2d 301 (1962). Thus a conflict also exists on this point which should be resolved by this Court.

Furthermore, the Respondent in the instant case never raised the issue of his insanity at the time of the trial. This is believed to be a waiver of that point. In *Fay* v. *Noia,* 372 U. S. 391, this Court restated the rule of *Johnson* v. *Zerbst,* 304 U. S. 458, 465 that for a waiver there must be "an intentional relinquishment or abandonment of a known right or privilege." The *Fay* case then said under those circumstances a federal right could be waived by a failure to raise it in a state prosecution. Here the Respondent, who was at all times represented by counsel, failed to raise the question of his insanity at the time of trial in the state proceedings even though it was his duty to do so under Illinois law. (*People* v. *Shrake,* 25 Ill. 2d 141). Yet, surely he was aware of that right because he raised the issue of his insanity at the time of the crime at the trial as his principal defense. It thus appears that all the elements of a waiver are present. At least there should be a hearing on the issue. However, the Court of Appeals remanded the case for a determination of the Respondent's sanity at the time of trial, thus foreclosing the issue of waiver.

Finally, it is believed that the facts elicited at trial are sufficient under *Townsend* v. *Sain*, 372 U. S. 293, to sustain the decision of the trial judge not to hold an evidentiary hearing on this point. True, the state trial judge never empaneled a jury to conduct a sanity hearing, but again the Respondent never requested one. Even in the absence of such a motion it is the judge's duty to empanel one if he has "a *bona fide* doubt" as to a defendant's present sanity. (*People* v. *Shrake*, 25 Ill. 2d 141). But the judge never experienced such a doubt. On arraignment the court was informed by the state that Respondent had previously been committed to a mental institution and a Behavior Clinic examination was ordered. At trial it was stipulated that if Dr. Haines, the Director of the Behavior Clinic of the Criminal Court of Cook County, were called as a witness, he would testify that he had examined the defendant approximately two months earlier and that at that time he knew the nature of the charges against him and was able to cooperate with counsel. This conclusion was reinforced by the personal observations of the experienced trial judge.

Because the Respondent raised the issue of his sanity at the time of the crime, he introduced all the evidence he had on the question of his sanity. It consisted of the testimony of four lay witnesses who concluded that he was insane.

The gist of this testimony was that a brick had fallen on the defendant's head when he was seven, that he acted somewhat "peculiar" thereafter, that once he kicked a hole in a family bar for no apparent reason, that he frequently was sullen and complained of headaches, that he quarrelled with his wife, that he was very nervous, that he often walked abruptly from his work and that in the past he had appeared "glassy-eyed" or in a daze. Clearly none of this testimony had any bearing on the issue of whether defendant understood the nature of the charges against him and could cooperate with his counsel.

More serious was the testimony that defendant in 1951 believed someone was going to kill him and that subsequently he was admitted to Kankakee State Hospital for six weeks, and that in 1952 he shot his baby and attempted suicide. However, the medical record from Kankakee State Hospital stated that defendant when admitted had been drinking heavily and described classical symptoms of delirium tremens. He was adjudged fully recovered when he was discharged. The record also revealed that defendant was convicted of the slaying of his child. This shows that he was unable to establish his insanity at that time.

On the basis of this record in the trial court, it is believed that the Illinois Supreme Court correctly affirmed the conviction and the Federal District Court properly dismissed the petition for a writ of *habeas corpus*. The Court of Appeals, therefore, improperly reversed that dismissal and that decision should be reversed.

CONCLUSION.

For the foregoing reasons this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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July ——, 1965

APPENDIX.

In The

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 14253 SEPTEMBER TERM, 1964 SEPTEMBER SESSION, 1964

United States *ex rel.* Theodore Robinson, *Petitioner-Appellant,* v. Frank J. Pate, Warden, *Respondent-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 3, 1965

Before SCHNACKENBERG, KNOCH and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* The district court denied, without hearing evidence, Robinson's petition under the Habeas Corpus Act, 28 U. S. C. §§2241-2254, to vacate his state conviction for murder and his life sentence. He has appealed, represented by counsel appointed by this court. We reverse and remand.

The district court in denying the petition relied upon the record and transcript of the murder trial without a jury in the Criminal Court of Cook County in 1959, and the opinion of the Supreme Court of Illinois in *People* v. *Robinson,* 22 Ill. 2d 162, 174 N. E. 2d 820, *cert. denied* 368 U. S. 857 (1961).

Robinson's petition alleges that he was denied due process of law under the Fourteenth Amendment at his bench trial by the State's failure to prove beyond a reasonable doubt his sanity at the time of the alleged murder, by the trial court's failure to conduct on its own Motion a hearing into his competence to stand trial, and by the court's denial of his Sixth Amendment right to compulsory process.[1]

Robinson contends on this appeal that the district court erred in failing to require respondent to file a return to his petition, in refusing to appoint counsel for him, and in failing to hold an "evidentiary hearing" in accordance with the rules in *Townsend* v. *Sain*, 372 U. S. 293 (1962).

We recognize the severe pressure upon the state criminal trial courts to dispose of cases with dispatch in order to maintain a reasonable currency between indictment and trial. This salutary goal, however, must not be reached at the expense of constitutional rights. Robinson's trial was conducted under an undue preoccupation with hurried disposition in an atmosphere charged with haste, hardly consistent with the gravity of a capital case and protection of the right to due process.[2] One result of the unusual

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1. Judges Schnackenberg and Knoch do not concur in that portion of this opinion, beginning at p. 8, dealing with the Sixth Amendment question. See the specially concurring opinion of Judge Schnackenberg, *infra*, p. 12, and the dissenting opinion of Judge Knoch, *infra*, p. 12.

2. The following statements are taken from the transcript of the second day of the trial, commencing with the presentation of the case for the defendant late in the morning session. Number references are to the page in the transcript.

(207) The Court: Let's proceed, please. We have wasted fifteen minutes. We have thousands of indictments wait-

haste was denial to Robinson, an indigent represented by court-appointed counsel and obviously without funds to pay for expert psychiatric testimony, of a fair opportunity to obtain volunteer expert testimony from a public agency. We shall consider this result later in the opinion.

The conviction by a state court of a person for an alleged crime committed while insane violates due process under the Fourteenth Amendment. *Smith* v. *Baldi*, 344 U. S. 561, 570 (1952) (Frankfurter, J., dissenting); *People* v. *Robinson*, 22 Ill. 2d 162, 174 N. E. 2d 820 (1961). And while the State must prove the sanity of the defendant at

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ing for trial. I can't waste fifteen minutes waiting for defense counsel. Let's move.

(208) Mr. McDermid: May I have one minute to satisfy—

The Court: We have wasted eighteen minutes. You must prepare your lawsuit before you come to court. We have been on trial now for a whole day and a half and you have had ample time to talk to your client. Go ahead, talk to him now.

(209) The Defendant: I would like that the court be adjourned until tomorrow morning.

The Court: No, sir.

The Defendant: To give me time to confer with counsel for the calling of witnesses.

The Court: No, sir. We have been waiting here since 11:00 o'clock, waiting for your lawyer. It is now 11:30. We have been on trial a day and a half.

(246) The Court: All right. Call your next witness. I understand that the lady is here now, Helen Calhoun. Helen Calhoun is here. Let's move along a little faster, please.

(259) The Court: Are you going to be with this witness much longer? We are well into the lunch hour.

(273) [immediately following the conclusion of the final argument for the defendant:]

the time of the alleged crime, that burden is satisfied in Illinois by the presumption of sanity until the introduction of evidence sufficient to raise a reasonable doubt of the defendant's sanity, at which time the necessity of affirmative proof of sanity beyond a reasonable doubt becomes the burden of the State. *People* v. *Skeoch*, 408 Ill. 276, 280, 96 N. E. 2d 473 (1951); *People* v. *Patlak*, 363 Ill. 40, 1 N. E. 2d 228 (1936).

Robinson's defense to the indictment was insanity at the time of the alleged murder. He contends that he was insane at the time of the trial also, or that at least there was a bona fide doubt of his sanity raised so that the trial judge on his own motion should have impanelled a jury and conducted a sanity hearing pursuant to the then 38 Ill. Rev. Stat. §§592-593 (1963).[3]

The Court: Very well. All right, bring up the defendant please.

The defendant is found guilty of the crime of murder. He is sentenced to the State Penitentiary for a term of his natural life. Take him away.

The Defendant: Judge, your Honor, may I say something before you take me out of your courtroom?

The Court: Yes, sir.

[The defendant then protested against failure of his counsel to call certain witnesses.]

The Court: The Court is satisfied beyond a reasonable doubt—

The Defendant: Still and all, may I still say something?

The Court: (Continuing) —that you killed this woman. Whether those were your clothes or not your clothes, it doesn't make any difference. Take him away. Call the next case.

3. *People* v. *Burson*, 11 Ill. 2d 360, 368, 370, 143 N. E. 2d 239 (1957); *Brown* v. *People*, 8 Ill. 2d 540, 134 N. E. 2d 760 (1956).

Robinson did not testify. The defense presented four relatives and friends as lay witnesses and the stipulated testimony of a police officer on the question of his sanity. Each witness stated his opinion that Robinson was insane and did not know the difference between right and wrong.

The testimony showed a continuing history of erratic and violent behavior by Robinson from the time he was struck on the head by a falling brick as a child until the unusual circumstances of the fatal shooting and his arrest. Incidents related included a commitment for a short time to a state mental hospital in 1951, from which he was released at his wife's request, the killing of his eighteen month old baby [4] and his contemporaneous attempted suicide, an attempt to burn his wife's clothes, and his mother's attempts to have him recommitted within a year before the alleged murder.

Robinson's behavior in the shooting and his subsequent arrest was also erratic. Flossie Mae Ward, the victim, a woman with whom Robinson had been living, worked at the restaurant where the shooting occurred. Robinson entered the restaurant carrying a gun which he pointed at Mrs. Ward, within a distance of five feet or less, without saying a word. Upon seeing him she said, "Ted, don't start nothing tonight," and went back to her work. Robinson then moved quickly to the back of the room, a distance of twenty feet or more, and jumped over the counter; as a result, two other employees were placed between him and Mrs. Ward. He rushed past them and fired one or more shots at the victim. Both Robinson and Mrs. Ward then

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4. This incident occurred in 1953. The record is unclear on this point, but it appears that Robinson served a sentence of only three years after being convicted of shooting the baby.

jumped over the counter and ran out the door onto the sidewalk, where her body was found.

The evening following the shooting, Robert Moore told the police that Robinson was at Moore's apartment. When officers in uniform arrived on the floor of the apartment, Robinson was standing in the hall near the elevator. The officers went by him, talked to Mr. and Mrs. Moore in Robinson's view, with guns drawn, and being informed that Robinson had just left, went back down the hall and asked Robinson to identify himself. He did. Robinson had remained where he was, even though he could have entered the elevator without passing the policemen while they talked to the Moores.

The shooting occurred, and the trial was held, in 1959. The State introduced the record of Robinson's discharge from a mental hospital in 1951, a stipulation of an adjudication in 1953 that he was sane, and a stipulation that the director of the court's Behavior Clinic would, if called, testify, on the basis of an examination two months before trial, that Robinson was able then to understand the charge against him and to cooperate with his counsel.

The morning of the second day of the trial the court was told by Robinson's attorney that they had hoped to have a doctor from the Psychiatric Institute testify that afternoon but had been unable to reach him. He said they were sure the doctor could be called the next morning, but the court, when no assurance was given that the doctor had been subpoenaed, refused to continue the case until the next morning in order to hear the doctor's testimony.[5]

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5. The Court: Did you subpoena him?

Mr. McDermid: I understand that it was done but I am not really sure.

The Court: If you subpoenaed him, I will issue an attachment. If you did not subpoena him, we cannot delay

The trial concluded that afternoon without the doctor's testimony and without an expert witness called for or against Robinson.

After the verdict and sentence to life imprisonment, one of Robinson's attorneys stated that he had made two or three dozen calls to psychiatrists, that he had contacted the Illinois Psychiatric Society and its officers, and that he had asked a private psychiatrist for assistance—all to no avail. He stated that he did not believe in subpoenaing a psychiatrist to testify when he did not know if the particular doctor would be cooperative.

The trial court made no express finding that Robinson was sane at the time of the alleged murder, but that finding is implicit in the judgment of guilt. The Illinois Supreme Court on appeal held, however, that the evidence at the trial failed to raise a reasonable doubt as to Robinson's sanity, since most of the incidents related by the witnesses occurred several years prior to the fatal shooting and there was no evidence that Robinson's mental illness was "of a permanent and continuing nature." *People* v. *Robinson*. 22 Ill. 2d 162, 169, 174 N. E. 2d 820 (1961).

But that court, in its opinion, made no mention of the hasty trial of this capital charge with the denial of a reasonable opportunity to Robinson to obtain psychiatric testimony which could have had substantial bearing upon the very question of Robinson's "permanent and continuing" mental state. Presumably the Illinois Supreme Court saw little importance in the testimony of Robinson's mother of her unsuccessful attempts to have the police arrest her son so that he could be confined in 1958, or in the testimony

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the trial. You must prepare your lawsuit before you go to trial. You are on trial now for two days. Other cases are waiting. We have to proceed. If you subpoenaed him, prepare a petition and I will send for him. If you did not subpoena him it is unfortunate.

concerning Robinson's eccentric behavior in committing the alleged murder. The mother's attempt to have Robinson committed the year before that homicide and his odd antics in the homicide were five and six years after the adjudication of sanity. Finally, although the Illinois Supreme Court did consider the claim of Robinson that he was denied the right to compulsory process to obtain as witnesses Mr. and Mrs. Moore, outside of whose apartment Robinson was arrested the day after the homicide, the court, among other things, stated that no showing had been made that the witnesses sought were material. It could be that their observation of Robinson the day following the homicide was material to the question of his insanity the previous night.

We turn now to the question of Robinson's competency to stand trial.

Due process requires that a person be not convicted of a crime while he is insane. *People* v. *Robinson*, 22 Ill. 2d 162, 174 N. E. 2d 820 (1961). And the denial of a reasonable request to obtain the services of a necessary psychiatric witness is effectually a suppression of evidence violating the fundamental right of due process. See *United States* v. *Ogilvie*, 334 F. 2d 837, 843 (7th Cir. 1964). Neither Robinson nor his attorney moved for an inquiry into defendant's sanity at the time of trial. In Illinois, however, the trial judge is required, whenever a bona fide doubt is raised as to the defendant's sanity at the time of the trial, to impanel a jury and conduct a sanity hearing. *People* v. *Lego*, ... Ill. 2d ....., 203 N. E. 2d 875 (1965); *People* v. *Robinson*, p. 167. This procedure satisfies the requirement of due process; to deny the established procedure to a particular accused, however, is a denial of due process. *Thomas* v. *Cunningham*, 313 F. 2d 934, 938 (4th Cir. 1963).

As we have indicated, Robinson did not testify in his behalf, and the testimony with respect to his sanity came

from relatives and friends. The opinion of these witnesses was that Robinson did not know the difference between right and wrong. We have discussed at length their testimony hereinabove. The only evidence introduced for the prosecution specifically on the question of Robinson's competency to stand trial was a stipulation at the end of Robinson's case that if called, Dr. Haines, the director of the Behavior Clinic of the Criminal Court of Cook County, would testify that he examined Robinson about two months prior to trial and that in his opinion Robinson was at that time able to understand the nature of the charges against him and to cooperate with counsel. The Assistant State's Attorney sought a broader stipulation from defense counsel. Failing in this, he told the court,

> Now the defense raised here is such that I think we should have Dr. Haines' testimony as to his opinion whether this man is sane or insane. It is possible that the man might be insane and know the nature of the charge or be able to cooperate with his counsel. I think it should be in evidence, your honor, that Dr. Haines' opinion is this defendant was sane when he was examined.

The trial court stated that the doctor's testimony was not needed, since there was already enough in the record.

There was no express finding by the trial court that defendant was competent to stand trial. There is only our inference, of that finding, drawable from the judgment of guilt and from the trial court's statement referring to the State's Attorney's suggestion that the director of the Behavior Clinic should be called as a witness, that "You have enough in the record now. I don't think you need Dr. Haines."

Denial of a reasonable opportunity to obtain psychiatric testimony for Robinson could also have weighed heavily on

the question of his competency to stand trial. The case closed with no psychiatric witnesses called to give testimony either on the defense of insanity or on Robinson's competence to stand trial. We have pointed out that denial of a fair opportunity to obtain necessary testimony is effectually to suppress it. See *United States* v. *Ogilvie,* 334 F. 2d 837, 843 (7th Cir. 1964). The Illinois Supreme Court thought no facts were brought to the trial court's attention to raise a doubt of defendant's sanity requiring an inquiry; that the "traits, conduct and crimes" of Robinson were not proved to be "true manifestations of insanity"; that the conclusions of the defense witnesses were based on incidents many years before the trial, having little relevancy at the time of trial; that the court was aware of Robinson's confinement eight years earlier, and of the records of his condition and discharge and of his adjudication of sanity six years before the trial; and that the court had before it the stipulation concerning Dr. Haines, the director of the Behavior Clinic, as well as Robinson's display at the trial of his ability to rationally assist in the conduct of his defense.

We point out again that the only likely means Robinson had to prove his "traits, conduct and crimes" were "true manifestations" of insanity was the psychiatric testimony he was denied a reasonable opportunity to obtain; and again we note his mother's testimony of her unsuccessful attempt in 1958 to have the police arrest her son for confinement because of his irrational conduct at the time and the testimony of his erratic conduct in committing the homicide, both of which events occurred after the adjudication of sanity.

We are mindful of the admonitions to the district courts in *Townsend* v. *Sain,* 372 U. S. at 318, with respect to "their delicate role in the maintenance of proper federal-state

relations." But the district court is reminded in *Townsend* of its power to "try the facts anew," 372 U. S. at 312, where an applicant in habeas alleges facts which, if proved, would entitle him to relief, and of the duty to exercise that power in a federal evidentiary hearing "unless the state court trier of facts has, after a full hearing, reliably found the relevant facts." 372 U. S. at 313.

Robinson's petition, and the record, present a substantial question of denial of his Sixth Amendment right to compulsory process [6] for witnesses in his behalf. At the commencement of the defendant's case Robinson protested that his attorneys had failed to subpoena two witnesses as he had instructed them. One of the attorneys stated to the court that he did not remember any such instruction. When Robinson was asked what the witnesses would testify to he replied that he did not know, but that he wanted them subpoenaed. The court stated that "We can't subpoena people unless you tell us what they are going to testify to."

The witnesses Robinson wanted called were Mr. and Mrs. Robert Moore. Prior testimony had disclosed that Robinson was present in their apartment the day after the shooting and that they had caused, and witnessed, his arrest. Hearsay testimony of their statements at the time of the arrest had been admitted into evidence without objection.

Following the announcement of the verdict and sentence, one of Robinson's attorneys stated that following Robinson's request during the trial for subpoenas he had talked to

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6. U. S. Const. amend. VI.

"In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ."

the Moores and determined that their testimony would not be helpful. He stated that Robinson was told of this and agreed that they should not be called.

In the wake of *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), holding that the Sixth Amendment right to counsel is embraced in the Fourteenth Amendment to protect that right against state action,[7] it follows that the right of compulsory process must similarly be included in the Fourteenth Amendment protection.[8] This right is as "implicit in the concept of ordered liberty" [9] as the right to counsel. In many cases unless a defendant had the opportunity to compel witnesses to appear in his behalf, the right to counsel would be meaningless. Unreasonable denial of a continuance to afford the defendant a timely opportunity to obtain witnesses by compulsory process was held to be a violation of this constitutional right in *Paoni* v. *United States,*

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7. Since this opinion was submitted the Supreme Court has decided in *Pointer* v. *Texas,* 33 *U. S. L. Week* 4306 (April 5, 1965) that a defendant's Sixth Amendment right to be confronted with the witnesses against him, and to cross-examine them, is applicable to the states by virtue of the Fourteenth Amendment. ("We hold today that the Sixth Amendment's right to an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment.") There is good reason to anticipate that before long the right to compulsory process for obtaining witnesses in his favor will likewise be made applicable to the states by the Supreme Court.

8. See *MacKenna* v. *Ellis* 263 F. 2d 35 (5th Cir.), *cert. denied* 360 U. S. 935 (1959); *MacKenna* v. *Ellis,* 280 F. 2d 592 (5th Cir. 1960), *modified on rehearing en banc* 289 F. 2d 928 (5th Cir.), *cert. denied* 368 U. S. 877 (1961).

9. *Palko* v. *Connecticut,* 302 U. S. 319, 325 (1937).

281 Fed. 801 (3rd Cir. 1922). And this basic right to process can be understandingly waived only by a defendant, not by his attorney. *Cf. Fay* v. *Noia,* 372 U. S. 391, 439 (1963).

If, as alleged by Robinson, he immediately upon learning that his attorneys had failed to subpoena Mr. and Mrs. Moore as he had instructed them, requested that they be subpoenaed, and if he did not later understandingly abandon his desire to have them called, then his constitutional right was violated. It was not necessary for him, as the state seems to have thought, as a prerequisite to the exercise of this right to be able to tell the court what testimony he expected from the witnesses. Without any specification by Robinson, the relationship of the Moores to the case should have been apparent from the testimony concerning Robinson's arrest. They saw Robinson the day after the homicide and could have given testimony of their observation of him, on the question of his insanity at the time.

A review of the record of the state trial persuades us that Robinson was convicted of murder and sentenced to life imprisonment in an unduly hurried trial without a fair opportunity to obtain necessary expert psychiatric testimony in his behalf, without sufficient development of facts on the issues of insanity at the time of the homicide and at the trial, and upon a record which does not show that the state court "after a full hearing reliably found the relevant facts."

We think our consideration and disposition of the foregoing questions compel the conclusion that the district court erred in not requiring a return to be filed by respondent to Robinson's petition. Under the mandatory provi-

sions of 28 U. S. C. § 2243 [10] a return is required unless the petition is patently frivolous or obviously without merit. *Brooke* v. *Anderson*, 317 F. 2d 179 (D. C. Cir. 1963); *Higgins* v. *Steele*, 195 F. 2d 366 (8th Cir. 1952). We hold that an evidentiary hearing was mandatory. The cause will be remanded for that purpose.

The cause is remanded to the district court with directions to appoint counsel for Robinson; to require the respondent to file a return; to proceed with a determination of the question whether, when Robinson committed the alleged murder in 1959, he was sane; and to provide a fair opportunity for appointed counsel—with whatever aid the district court can provide him—to obtain expert witnesses to testify on the question. If Robinson is found by the court to have been insane at the time in question he should be ordered released from custody of the respondent; such release should, however, be delayed for a reasonable time to be set by the district court for an opportunity by the appropriate State authorities to examine into Robinson's present mental health.

The district court should also determine upon the hearing whether Robinson was denied due process by reason of failure of the trial court on its own motion to impanel a jury and conduct a sanity hearing upon his competence to stand trial. If the court finds that Robinson's federal constitutional rights were violated in that respect, he should be ordered released, but such release may be delayed

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10. "A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto."

for a reasonable time to be set by the district court to permit the State of Illinois to grant Robinson a new trial.

Mr. John C. Tucker, of Chicago, Illinois, was appointed by this court to represent petitioner on this appeal. We thank him for his able and devoted efforts on behalf of his client.
No. 14253

SCHNACKENBERG, *Circuit Judge*, specially concurring.

I approve and concur in Judge Kiley's opinion, with the exception of that part dealing with Robinson's right to compulsory process for witnesses in his behalf, based on the Sixth Amendment. I believe that the supposed difference of opinion between Robinson and his attorneys as to whether these witnesses should be called or not, does not afford a basis for a charge of a violation of his constitutional rights.

KNOCH, *Circuit Judge* (dissenting). Regretfully, I find myself in disagreement with the opinion of the majority.

As the Illinois Supreme Court noted in its opinion on defendant's writ of error proceeding, neither defendant nor his counsel requested a sanity hearing. Granted that it was the duty of the Trial Judge to impanel a jury to determine the issue if the facts brought to the Court's attention or the personal observations of the Trial Judge raised a bona fide doubt of defendant's sanity. Here the Trial Judge, who was advised of the facts of the defendant's past medical history, had more than the usual opportunity to evaluate the defendant's demeanor in Court because of the several colloquys between the defendant and the Judge. Manifestly the Trial Judge experienced no bona fide doubt as to defendant's sanity. Lacking his unique advantages for such observation, it seems to me somewhat presumptu-

ous for this Court, or the District Court, to say that he ought to have entertained such doubts.

As to denial of continuance to subpoena two additional witnesses, whom defendant's counsel had not seen fit to call, it seems only fair to me that the Trial Court be given some inkling of the nature of their anticipated testimony to justify the continuance sought mid trial.

I would affirm the decision of the District Court. In my opinion the Illinois Supreme Court has adequately dealt with the issue raised here and its decision should not be disturbed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.